(9)

No. 87-1729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,
Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

In 1984, Congress amended the forfeiture provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. (Supp. IV 1986) § 853, to include restraining order provisions and a "relation back" provision, vesting title to forfeited assets in the government upon commission of the underlying crime. This case presents the following questions:

1. Whether Congress in the 1984 amendments intended to authorize the restraint and forfeiture of assets sought to be paid to a lawyer in good faith by a criminal defendant as reasonable fees for the purpose of securing representation against the criminal charges upon which the proposed forfeiture is based.

2. If the first question is answered in the affirmative, whether the 1984 amendments are unconstitutional under the Sixth Amendment, by depriving the defendant of his qualified right to counsel of choice, or under the Fifth Amendment, by destroying the balance of forces between the government and the accused.

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a-29a) is reported at 837 F.2d 637. The opinion of the court of appeals panel (Pet. App. 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (Pet. App. 81a-92a) is reported at 631 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on January 11, 1988 (J.A. 9). On February 26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988. The petition was filed on that date and was granted on November 7, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, and the relevant provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. § 853, are set out in the appendix to the petition (Pet. App. 93a-103a).

STATEMENT

1. Congress enacted the Continuing Criminal Enterprise (CCE) statute in 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265, originally codified at 21 U.S.C. (1970 ed.) § 848. Since its enactment, the CCE statute has contained an *in personam* forfeiture penalty that is imposed as a part of the sentence of a defendant convicted of a CCE violation. The forfeiture extends to proceeds of the CCE violation and to any property affording an "interest in" or "source of influence over" the illegal enterprise (21 U.S.C. (Supp. IV 1986) § 853(a)(3)). The Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. (Supp. IV 1986) § 1963, contains similar forfeiture provisions.[1]

Congress amended the forfeiture provisions of CCE and RICO in 1984 to enhance the government's ability to prevent defendants from evading the forfeiture penalty by transferring assets before conviction. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 2301, 98 Stat. 2192-2193 ("the 1984 Act"), codified at 21 U.S.C. (Supp. IV 1986) § 853. Three aspects of the 1984 Act are particularly relevant here. First, Congress amended the statutory restraining-order provisions to authorize a district court to issue *ex parte* orders, based solely on the indictment, restraining a defendant from transferring any asset alleged to be forfeitable. 21 U.S.C. (Supp. IV 1986) § 853(e)(1)(A). Second, Congress added a provision, commonly called the "relation-back" provision, that vests title to forfeitable assets in the government at the time of the criminal violation, thus permitting the government to seek forfeiture of assets subsequently transferred by the defendant to third parties. 21 U.S.C. (Supp. IV 1986) § 853(c). Finally, Congress provided that a third-party transferee of forfeitable assets can defeat forfeiture by proving at a post-conviction hearing that the transfer was a *bona fide* exchange for value and that he was, at the time of the transfer, "reasonably without cause to believe that the property was subject to forfeiture." *Ibid.*; *see* 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B).

[1] While this case concerns a CCE prosecution, the RICO forfeiture provisions are substantially identical to the CCE version, and the courts have interpreted them similarly. *See* Pet. App. 2a. For purposes of simplicity, we generally will cite only the CCE provisions.

Congress explained that the purpose of the 1984 Act was "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions." S. Rep. 98-225, 98th Cong., 2d Sess. 191, 200-201 (1984). Congress stated that the relation-back provision was aimed at "improper pre-conviction transfers" (*id.* at 196, 197) and at "improper disposition of forfeitable assets" (*id.* at 194). Noting that the 1984 Act "should not operate to the detriment of innocent *bona fide* purchasers of the defendant's property" (*id.* at 201), Congress explained that the exception for good-faith transferees "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (*id.* at 209 n.47). Referring to the amended restraining-order provision, the House Report stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt.1, 98th Cong., 2d Sess. 19 n.1 (1984).

2. Caplin & Drysdale, Chartered, was retained by Christopher Reckmeyer in the summer of 1983 in connection with a grand jury investigation in the Eastern District of Virginia (Pet. App. 4a). At the time Caplin & Drysdale undertook the representation, it believed the investigation to involve possible violations of the criminal tax laws. Eighteen months later, the investigation culminated in an

indictment against Reckmeyer and 25 other individuals for 48 counts of tax and drug crimes (Pet. App. 82a; J.A. 28-40).

The indictment, handed down under seal on January 9, 1985, included a CCE count and sought forfeiture of virtually all of Reckmeyer's assets (Pet. App. 4a; J.A. 1). Specifically, the CCE count sought to forfeit "any profits" and any property affording "a source of influence over [the] enterprise, including but not limited to" a long list of assets (J.A. 33-40). That list contained generic descriptions of the assets to be forfeited, such as "any and all possessions" of Reckmeyer with a value in excess of $1,000 (J.A. 37) and "any monies deposited by or on behalf of" Reckmeyer in any bank (J.A. 39).

On January 14, 1985, the day before the indictment was unsealed, the government sought and obtained an *ex parte* restraining order from the district court (J.A. 11-27). The order enjoined Reckmeyer from transferring or disposing of any assets listed in the indictment, specifically including any "currency" in excess of $1,000 (Pet. App. 4a, 82a; J.A. 18, 23). The order likewise enjoined Reckmeyer from "removing from any checking or savings account" any "monies deposited" therein (J.A. 18, 25).

During the investigation preceding Reckmeyer's indictment, Caplin & Drysdale had tendered bills and been paid for its legal services at the standard hourly rates for the attorneys involved. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale $26,445 for services rendered and costs incurred through that date (Pet. App. 82a; J.A. 67). The day before the indictment was unsealed, Caplin & Drysdale received two checks from Reckmeyer, each in the amount of $5,000, in partial payment of amounts due on the outstanding bills (J.A. 67). These checks were deposited, but they subsequently were returned unpaid to Caplin & Drysdale because of the restraining order. On January 25, 1985, just prior to his surrender to authorities, Reckmeyer paid Caplin & Drysdale $25,480 in cash (Pet. App. 39a; J.A. 67-68). The firm notified the district court

of its receipt of these funds, which were then deposited in a separate escrow account pending further order of the court (*ibid.*) At Reckmeyer's request, Caplin & Drysdale continued to represent him after the indictment (Pet. App. 39a; J.A. 68).

Reckmeyer subsequently filed a motion seeking modification of the restraining order to permit payment of attorneys fees (Pet. App. 82a; J.A. 43). On March 14, 1985, the day before the motion was to be heard, Reckmeyer pled guilty to three counts of the 48-count indictment, including the CCE count on which the forfeiture allegations were based (Pet. App. 82a). At the hearing the next day, the district court denied the motion for modification of the restraining order, citing Reckmeyer's guilty plea (J.A. 54-55). The court stated, however, that Caplin & Drysdale could raise the issue of forfeitability of attorneys fees, on its own behalf, in the context of a third-party petition against forfeited assets (*ibid.*). Reckmeyer was sentenced on May 17, 1985, to 17 years in prison without parole, and was ordered to forfeit virtually all his assets, including the cash held in escrow and the bank accounts on which the dishonored checks to Caplin & Drysdale had been drawn (Pet. App. 82a-83a; J.A. 62-63).

Caplin & Drysdale filed a claim in post-conviction proceedings under 21 U.S.C. (Supp. IV 1986) § 853(n) to an interest in the forfeited property in the amount of $196,958 (J.A. 66-69). This sum represented the full amount owed to the firm for unpaid legal services rendered to Reckmeyer before and after his indictment, specifically including the $25,480 in cash and $10,000 in dishonored checks received in January 1985 (J.A. 69). The government conceded the reasonableness and legitimacy of Caplin & Drysdale's fees (J.A. 96), but argued that the "relation-back" provision vested prior title to Reckmeyer's assets in the government and prevented payment of any fees (J.A. 82-84).

The district court rejected the government's contention and ordered it to pay $170,513 to Caplin & Drysdale out

of Reckmeyer's forfeited assets (Pet. App. 92a). The court found that Caplin & Drysdale "was a good faith provider of services for value" (*id.* at 83a) and held that Congress had not intended the 1984 Act to encompass the forfeiture of *bona fide* attorneys fees (*id.* at 92a). A contrary interpretation of the statute, the district court concluded, would violate a defendant's Sixth Amendment rights by preventing him from retaining counsel of his choice (*id.* at 88a-92a). The interpretation urged by the government, the district court further concluded, would violate the Due Process Clause of the Fifth Amendment by creating conflicts between defense counsel and the criminal defendant that "would undermine the adversary system" (*id.* at 91a). In so holding, the court followed the rulings of other district courts, which similarly had concluded that "attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions." *Id.* at 86a (citing cases).

3. A panel of the Fourth Circuit unanimously affirmed, albeit on constitutional rather than statutory grounds (Pet. App. 41a-77a). While acknowledging that "a central concern behind the relation-back provisions was to void sham and fraudulent transfers" (*id.* at 49a), the panel concluded that the statutory language was not so narrowly confined (*id.* at 49a-51a); it accordingly ruled that the 1984 Act encompassed attorneys fees, even when paid in good faith and at arm's length (*id.* at 53a). The panel agreed with the district court, however, that this interpretation of the statute rendered it unconstitutional (*id.* at 70a):

> [T]o the extent the Act authorizes freeze orders and forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the [S]ixth [A]mendment right to counsel of choice.

The panel acknowledged that the right to counsel of choice is "qualified" and must be balanced against countervailing

government interests (*id.* at 66a-70a). But it concluded that the government's asserted interests—deterrence, preserving property for forfeiture, and depriving convicted persons of their economic power—did not outweigh "the primary right to representation by privately retained counsel of choice" (*id.* at 67a).

4. The Fourth Circuit granted rehearing *en banc* and, by a 7-4 vote, overturned the panel decision on the constitutional issues. The *en banc* court found no need to consider how the right to counsel of choice is "qualified," stating that this constitutional right "simply does not apply at all in the fee forfeiture context" (Pet. App. 11a). The majority stated that "[t]he right to counsel of choice belongs only to those with legitimate assets," and it concluded that a criminal defendant should be deemed to have no legitimate property, even prior to conviction, so long as "the government contests the legal ownership of the assets" (*id.* at 12a). This conclusion was founded on the statute's "relation-back" provision, which the majority analyzed as a property-law concept rather than as a punitive element of criminal *in personam* forfeiture. "[I]f [a defendant] has no uncontested assets available for securing private counsel," the majority concluded, the availability of an appointed attorney is sufficient to satisfy his Sixth Amendment rights (*id.* at 14a).

The majority acknowledged that "[f]ee forfeiture does indeed raise many complex problems concerning access to defense counsel, the attorney-client privilege, and the resource needs of public defenders" (Pet. App. 19a). Having failed to discern any constitutional right at issue, however, the majority dismissed these concerns as mere questions of policy properly addressed to Congress (*id.* at 19a-22a). Indeed, the majority asserted that Congress had already discerned a "compelling public interest" in stripping defendants, in advance of trial and conviction, of "the ability to command high-priced legal talent" (*id.* at 21a).

SUMMARY OF ARGUMENT

I. Under the 1984 Act, restraint and forfeiture of a defendant's assets do not automatically follow from the prosecutor's charges or the issuance of an indictment. Rather, Section 853(e)(1) requires the government to apply to the district court for a restraining order or other relief. Accordingly, unless the district court acts as a mere rubber stamp, it rather than the prosecutor decides whether and to what extent a defendant should be restrained prior to conviction from using or transferring assets that the government alleges are forfeitable.

The statutory language vesting the district court with authority to issue a restraining order does not support so perfunctory a judicial role. On the contrary, the use of the permissive "may" in Section 853(e)(1) rather than the mandatory "shall" clearly evidences a Congressional intent to vest the district court with its traditional equitable discretion in deciding whether, and on what terms, to issue a restraining order. *See United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir.), *cert. granted*, No. 88-454 (Nov. 7, 1988) (Winter, J., concurring). In accordance with traditional equitable standards, the district court must weigh the equities and competing hardships on the parties. Upon a comparison of the government's limited interests in obtaining a restraining order (*i.e.*, to prevent the defendant from making lavish expenditures in anticipation of conviction and forfeiture, from executing fraudulent or sham transfers, and from using assets for criminal purposes) with the defendant's vital interests in having food, shelter, medical care, and defense counsel pending trial, the district court, as Judge Winter concluded in *Monsanto*, must invariably strike the balance so as to allow a defendant to continue making ordinary lawful expenditures, including those for *bona fide* attorneys fees. 852 F.2d at 1406-1409.

As Judge Winter further concluded, any funds paid in good faith to third parties in accordance with the district court's exercise of discretion under Section 853(e)(1) must not be subject to post-conviction forfeiture. This conclusion

follows from Congress's use of permissive language in Section 853(c), which states that assets transferred to a third party "may be the subject of a special verdict of forfeiture." This conclusion is likewise dictated by the "Catch-22" result that would occur if assets used by the defendant, with the district court's permission, to pay for legitimate living expenses and legal fees could subsequently be recaptured from the payees through post-conviction forfeiture. In order to vindicate its authority under Section 853(e)(1) to permit payments to third parties for necessities, the district court must exercise its discretion under Section 853(c) by declining to order the forfeiture of property it previously had authorized the defendant to transfer to an attorney or other third-party providers.

Petitioner submits that this Court should adopt Judge Winter's construction of the statute in *Monsanto*. Although the Act does not expressly exempt attorneys fees from forfeiture, it does not follow that such fees (or the funds needed to pay them) should or must be forfeited. Both the statute's language and its legislative history indicate that Congress intended to leave the district court with its full equitable discretion in deciding whether to issue a restraining order and, if so, the scope of such order. As Judge Winter concluded, a proper balancing of the hardships dictates that whatever assets are needed by the defendant to make ordinary and necessary living expenditures, including those to retain private defense counsel, must be exempted from a post-indictment restraining order and immunized from post-conviction forfeiture.

II. This Court has often held that statutes should be construed where possible to avoid decision of serious constitutional questions. This canon of construction is particularly apposite here. If the 1984 Act is read to permit the government to render a defendant indigent upon indictment, unable to defray either his necessary living expenses or the cost of a legal defense, the statute would be unconstitutional under the Fifth and Sixth Amendments.

This Court recently reaffirmed that an accused has a "Sixth Amendment right to choose [his] own counsel."

Wheat v. United States, 108 S.Ct. 1692, 1697 (1988). When considering the validity of government-imposed restrictions on this constitutional right, the Court has balanced the defendant's interest in retaining a particular lawyer against the government's countervailing interests, including its interest in maintaining the fair administration of justice. The Court has not previously considered a situation, such as this one, in which the government seeks to deprive a defendant of the ability to retain private counsel of any kind.

Applied in the present context, the balance of interests plainly favors the defendant. On the one hand, the government has no substantial interest in disabling the defendant from paying legal fees and other living expenses pending trial, since the funds used to pay such expenses would not, in the normal course of events, have been available for forfeiture at the time of conviction. Moreover, since the government will have to pay for court-appointed counsel for the defendant in any event, the only benefit to the government from preventing retention of private counsel will be the marginal difference between the cost of such retained counsel and the lesser cost to the government of appointed counsel. Such a financial benefit is neither a purpose of the 1984 Act nor a substantial governmental interest. On the other hand, the interference with the defendant's ability to hire counsel is complete. No defendant subject to a broad forfeiture claim, such as the claim in this case, will be able to pay (or assure payment to) a lawyer. He will thus be prevented, not just from hiring a particular lawyer, but from hiring private defense counsel of any kind. Such an extreme restriction on a defendant's right to retain counsel of choice, in the absence of any substantial countervailing governmental interest, clearly violates the Sixth Amendment.

The forfeiture of attorneys fees would also violate the Due Process Clause of the Fifth Amendment by destroying the "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Simply by appending a forfeiture count to a CCE or RICO

indictment, a prosecutor would enjoy the "ultimate tactical advantage of being able to exclude competent defense counsel as he chooses." *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985). "Given the potential for prosecutorial abuse or manipulation," the district court below concluded (Pet. App. 91a), "such a veto power over the defendant's choice of counsel is clearly intolerable." Furthermore, by shifting the defense of complex CCE and RICO cases to already overburdened court-appointed attorneys and public defenders, the government will, through the exercise of prosecutorial discretion concerning forfeiture charges, be able to increase substantially the likelihood of obtaining convictions by eliminating the experience, talent and investigative resources of the private defense bar. The creation of such an imbalance of powers between the government and criminal defendants severely undermines our adversary system of justice and violates the Fifth Amendment.

ARGUMENT

I. THE STATUTE MUST BE INTERPRETED TO PERMIT A DEFENDANT TO PAY HIS ORDINARY AND NECESSARY LIVING EXPENSES, INCLUDING REASONABLE ATTORNEY'S FEES, PRIOR TO THE CONCLUSION OF TRIAL

The Fourth Circuit's decision in this case effectively destroys the ability of a CCE or RICO defendant to retain private counsel. In any case, such as this one, where the indictment alleges forfeitability of substantially all the defendant's assets, and the district court issues a restraining order coextensive with those forfeiture allegations, the defendant for practical purposes is instantly reduced to indigency. Absent some means of freeing a portion of his or her assets to pay a lawyer and to provide for other necessary living expenses, such a defendant will be unable to retain private counsel and will otherwise be required to live, at least through the completion of trial, on public or private charity.

The fundamental issue presented here is whether the forfeiture provisions must be read, as the government con-

tends and the Fourth Circuit held, to empower a prosecutor, by unproven allegations in an indictment, to beggar a defendant in this way. In his concurring opinion in *United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir. 1988), *cert. pending*, No. 88-454, Judge Winter convincingly explained why the government's reading of the statute is incorrect. Judge Winter's approach is faithful to the language and legislative history of the forfeiture provisions, and it is consonant with the principles that have traditionally guided courts of equity. His approach protects the legitimate interests of defendants prior to the conclusion of trial, without compromising Congress's objective of preventing the dissipation of assets that would be available for post-conviction forfeiture in the normal course. Not least significantly, his approach avoids decision of difficult constitutional questions that would otherwise have to be reached.

A. A District Court Must Apply Normal Equitable Principles In Determining Whether, And On What Terms, To Grant A Post-Indictment Restraining Order

The threshold question addressed by the Fourth Circuit *en banc* was "whether the [statute] permits the forfeiture of attorneys' fees" (Pet. App. 5a). Finding no explicit exemption for such fees, the court had no difficulty in answering this question affirmatively. But the court got to the wrong result because it began with the wrong question. The question it should have asked is whether the statute also permits a district court to *deny* the government's request to restrain and forfeit *all* of a defendant's assets, and instead to restrain only those assets not needed to defray the defendant's ordinary and necessary living expenses, including reasonable attorneys fees, prior to the conclusion of trial. The language and legislative history of the statute clearly show that the district courts possess such discretion and that they must exercise it according to traditional principles of equity.

1. The post-indictment restraint provision of the CCE statute, 21 U.S.C. (Supp. IV 1986) § 853(e)(1)(A), entitled "Protective orders," provides in pertinent part as follows:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property * * * for forfeiture under this section—
>
> (A) upon the filing of an indictment or information charging a violation * * * for which criminal forfeiture may be ordered * * *.

This language plainly gives the district court discretion to decide whether or not to grant a restraining order, as well as to decree the terms on which any order shall issue. The statute lists "restraining order[s]" as but one permissible remedy, authorizing the court alternatively to require a "performance bond" or "take any other action." More fundamentally, the statute uses the permissive word "may" rather than the mandatory terms "must" or "shall." This shows beyond peradventure that Congress intended to vest the court with discretion to formulate appropriate equitable relief. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983); 2A Sutherland Statutory Construction § 57.03 at 643 (4th ed. 1984) (the form of verb used in a statutory provision is the single most important textual consideration in determining whether the provision is mandatory).[2]

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[2] Even where Congress has used mandatory terms like "shall" or "must," this Court has hesitated to conclude that courts of equity lack discretion to fashion appropriate relief. For example, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court construed as permissive a provision in the Emergency Price Control Act stating that, upon a proper showing of a violation by the Secretary, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The district court had found that violations had occurred, but had refused to issue an injunction because the violations were inadvertent and the defendant had taken remedial action. This Court upheld the district court's action, concluding that the phrase " 'shall be granted' is less mandatory than a literal reading might suggest" (321 U.S. at 328). The Court found support for its conclusion both in the language of the statute, which authorized "other order[s]" as well as injunctive

The conclusion that district courts retain discretion under Section 853(e)(1) to define the appropriate contours of a post-indictment restraining order comports with the precept that "[t]he ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions." *United States v. Thoman*, 156 U.S. 353, 359 (1895). This conclusion is likewise consistent with the established canon that courts retain their full equitable powers absent a clear statement of contrary legislative intent. As this Court stated in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946):

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. * * * It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest.

Accord, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"); *Yakus v. United States*, 321 U.S. 414, 441 (1944).[3]

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relief, and in the legislative history, which stated that a court was "to issue whatever order to enforce compliance is proper in the circumstances of each particular case" (*id.* at 329 (citation omitted)). "A grant of jurisdiction to issue compliance orders," the Court concluded, "hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made" (*ibid.*).

[3] These cases exemplify a long line of decisions affirming the principle that federal courts retain the full scope of their equitable discretion unless Congress expressly acts to restrict it. *See, e.g., Amoco Production Co. v. Village of Gambell*, 107 S. Ct. 1396, 1403 (1987) ("An injunction * * * was not the only means of ensuring compliance with the Act and we found nothing in the Act's language and structure or legislative history which suggested that Congress intended to deny courts their traditional equitable discretion."); *United States v. Rodgers*, 461 U.S. 677, 707-708 (1983) ("reading 'may' as either conferring or confirming a degree of equitable discretion conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion"); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16-17 (1971); *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 290-291 (1960).

2. This Court's decisions make clear that a district court, in exercising its equitable discretion, must evaluate the balance of hardships as between the competing parties. In *Weinberger v. Romero-Barcelo, supra*, the Court reviewed the well-established principles governing the award of equitable relief in federal courts. At the outset, the Court noted that an injunction, as an equitable remedy, should not issue as a matter of course. 456 U.S. at 312 (*citing Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975)). Where the litigants present competing claims of injury, the court must balance those claims and consider the effect on each party of granting or withholding the requested relief. *Weinberger*, 456 U.S. at 313 ("The traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims.").[4]

Even if the relative hardships tip decidedly in favor of issuing a restraining order, the court is not obligated mechanically to grant the full relief requested. Rather, the court must exercise its discretion and tailor the scope of the remedy to fit the situation before it. "A basic principle

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[4] *Accord, e.g., Yakus v. United States*, 321 U.S. 414, 440 (1944) (a court of equity must "balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction"). *See also Amoco Production Co. v. Village of Gambell*, 107 S. Ct. at 1402; *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959); *Hecht Co. v. Bowles*, 321 U.S. at 329.

of the law of equitable remedies * * * is that the relief granted should be no broader than necessary to cure the effects of the harm caused." *Soltex Polymer Corp. v. Fortex Industries Inc.*, 832 F.2d 1325, 1329 (2d Cir. 1987). The authority to narrow or limit the scope of relief—by reference, among other things, to the balance of hardships between the parties—is inherent in the district court's power to do equity.[5]

3. Nothing in the legislative history of the 1984 Act suggests that Congress intended to preclude a district court from exercising normal equitable powers in deciding whether, and on what terms, to issue a post-indictment restraining order under Section 853(e)(1)(A). To the contrary, the Senate Report explicitly states that the identical language now contained in 18 U.S.C. (Supp. IV 1986) § 1963(d)(1)(A) "does not exclude * * * the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper." S. Rep. 98-225, 98th Cong., 2d Sess. 191, 203 (1984). Congress emphasized that "at such a hearing the court is not to entertain challenges to the validity of the indictment," and that "the probable cause established in the indictment * * * is to be determinative of any issue regarding the merits of the government's case." *Id.* at 203. But the Report specifically states that "the court may consider factors bearing on the reasonableness of the order sought." *Id.* at 202.

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[5] *See Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. at 16 (nature of violation determines scope of equitable remedy); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) ("Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."); *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948) ("It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."); *Hecht Co. v. Bowles*, 321 U.S. at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to * * * mould each decree to the necessities of the particular case."); *United States v. Morgan*, 307 U.S. 183, 194 (1939).

The only factor other than the merits of the government's claim to the allegedly forfeitable assets that might bear on the "reasonableness" of a post-indictment restraining order is its effect on the parties, including the hardship potentially imposed on the defendant. As Judge Winter wrote in *Monsanto*, 852 F.2d at 1406:

> It seems almost self-evident that if the purpose of the hearing is not to test the government's evidence of criminality, then its purpose must be to allow an informed balancing of the relative hardships on the parties according to traditional principles of equity.

The legislative history thus demonstrates that a court faced with a request for a post-indictment restraining order cannot "look behind" the indictment to question the government's likelihood of prevailing as to forfeiture. But the court must still apply traditional equitable factors—including an inquiry into the relative hardships on the parties—in determining the "reasonableness" of the relief sought. And the court must make this inquiry both at the *ex parte* proceeding in which the government initially requests a restraining order, and at any subsequent hearing in which the defendant requests that an existing order be modified.[6]

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[6] In the case of restraining orders sought *before* the filing of an indictment, Section 853(e)(1)(B) instructs the district court to determine, not only whether "there is a substantial probability that the United States will prevail on the issue of forfeiture," but also whether "the need to preserve the availability of the property * * * outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. (Supp. IV 1986) § 853(e)(1)(B)(i) & (ii). This specific statutory reference to hardship in the case of pre-indictment restraining orders by no means suggests that hardship, much less irreparable harm, is irrelevant to a district court's decision as to the appropriate scope of a post-indictment restraining order. The handing down of an indictment containing forfeiture counts makes it unnecessary for a court to consider whether there is a "substantial probability that the United States will prevail on the issue of forfeiture." But the indictment imports no more than a finding of probable cause; it thus has no effect on the other equitable factors—such as the balance of hardships between the

4. In sum, both the plain language of the statute and its legislative history show that Congress intended in Section 853(e)(1)(A) to confer discretionary power, and not to impose an absolute and mechanical duty on the district courts. A court therefore is not required to issue a restraining order coextensive with the forfeiture allegations of an indictment. Instead, the court must employ traditional equitable principles to formulate relief responsive to the legitimate needs of the parties before it. Indeed, we do not understand the government seriously to contest this point. In his petition for writ of certiorari in *Monsanto*, the Solicitor General acknowledged that "[t]he word 'may' in Section 853(e)(1)(A) * * * permit[s] the court to exercise some equitable discretion in determining whether to continue a restraining order * * * or instead to vacate or modify the order to grant the defendant access to the assets pending [the] outcome [of the trial]." U.S. Pet. in No. 88-454, at 21 n.16. And the government has made the same concession in the lower courts. *See, e.g.*, Brief for the United States at 17 n.4, *United States v. Fischer*, 833 F.2d 647 (7th Cir. 1987) ("It is clear that a district court retains some discretion in deciding whether to issue a restraining order" because the statute "provides only that the court *may* issue a restraining order based on the indictment") (emphasis original).

parties—that a court would normally consider in determining whether to grant equitable relief. Indeed, if a court faced with a request for a post-indictment restraining order could consider *neither* the government's probability of success *nor* the hardships between the parties, there would be nothing for it to do at all. Such a result—converting the district court into a rubber stamp—would be completely at odds with Congress's clear statement that the grant of a post-indictment restraining order is discretionary and that "the court may consider factors bearing on the reasonableness of the order sought." S. Rep. 98-225, *supra*, at 202.

B. Under A Proper Balancing Of The Equities, A District Court Must Ensure That A Post-Indictment Restraining Order Does Not Deprive The Defendant, Prior To The Conclusion Of Trial, Of The Ability To Pay Ordinary And Necessary Living Expenses, Including Reasonable Attorneys Fees

When the government seeks a restraining order under Section 853(e)(1)(A), the district court must assume that the government will likely prevail on its forfeiture allegations. Where the defendant has substantial assets subject to forfeiture, therefore, the balance of hardships typically will indicate that a restraining order of some kind should issue. But the balance of hardships will likewise dictate that the order, if issued, not disable the defendant from defraying normal living expenses—including food, shelter, medical expenses, and attorneys fees—prior to the verdict at trial. Until he is adjudged guilty beyond a reasonable doubt, the defendant has a strong, obvious and legitimate interest in not being rendered indigent, unable to purchase the bare essentials of life or to mount a legal defense against the very charges upon which the restraining order is based. And the government has no cognizable interest in preventing a defendant from paying for these necessities, since their payment will not deplete the estate of any assets that, in the normal course of events, would have been available for forfeiture at the time of conviction.

1. The defendant will suffer irreparable injury if he is rendered indigent before he is proven guilty

a. In any case involving a government request to restrain the use of allegedly forfeitable assets, the hardship on the defendant will obviously depend upon the scope of the government's request and the defendant's personal situation. It goes without saying that a defendant will suffer no legally cognizable hardship if he is prevented from making unlawful expenditures, from concealing his property, or from transferring his assets to evade forfeiture. A defendant will likewise have no legitimate interest in dissipating his potentially-forfeitable estate by indulging in an extravagant lifestyle. And even where life's necessities are

concerned, the defendant cannot reasonably insist on paying for them out of allegedly-forfeitable assets, if he has at his disposal other property, not subject to forfeiture, by which those expenses may be discharged.[7]

On the other hand, hardship to the defendant will be at its apogee where—as in this case—the government alleges that virtually *all* of the defendant's assets are forfeitable and then seeks a restraining order coextensive with those allegations of the indictment.[8] A defendant subject to such an order effectively becomes a pauper. Absent public welfare or private charity, he will be unable to obtain food, medical care, and other necessities during the period between indictment and conclusion of trial. Moreover, such an all-encompassing order will completely eliminate his ability to retain defense counsel of his choice—a right of constitutional dimension—since he will be unable to pay or assure payment to a lawyer.

In short, it seems incontestable that a defendant will suffer irreparable harm if he is rendered indigent before he is tried. We have discovered no case in which a federal court, exercising its equitable powers, has completely deprived a defendant of the ability to defray ordinary and necessary living expenses, based solely on a third party's unproven claim to his property.[9] Indeed, the government

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[7] If a defendant with property not subject to forfeiture does make expenditures out of forfeitable property, the statute authorizes the forfeiture of substitute property of equivalent value. 21 U.S.C. (Supp. IV 1986) § 853(p).

[8] The restraining order in this case, which was coextensive with the forfeiture allegations of the indictment, covered "any and all possessions" of Reckmeyer, including currency, with a value in excess of $1,000, as well as "any monies deposited by or on behalf of" Reckmeyer in any bank. J.A. 18, 23, 25, 37, 39.

[9] On the other hand, there are a number of cases in which courts have modified restraining orders to release funds needed by a defendant to pay for life's necessities, including the cost of legal defense. *See, e.g., United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984) (exempting from restraining order expenditures for the necessities of life for the defendant and his wife); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 99 (6th Cir. 1982) (pretrial restraining order in civil RICO action barred transfer or dissipation of the defendant's personal and real property, but provided that he "shall in no way be prohibited from conducting normal, day-to-day business activities, and the payment of trade payables not in excess of $5,000 each"); *United States v. Ianniello*, 644 F. Supp. 452, 459 (S.D.N.Y. 1985) (restraining order modified to extent of releasing earnings as were necessary to allow defendant to pay for necessities of life, including attorney's fees). *See also United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987) ("The defendant's interest in having access to funds needed to pay ordinary and necessary living expenses until the conclusion of trial * * * must be balanced against the government's interest in preventing the depletion of potentially forfeitable assets."). The cases permitting forfeiture of assets sought to be used for counsel fees or other necessities have based their holdings on the erroneous conclusion that the district courts lack discretion to do otherwise. *See, e.g., United States v. Nichols*, 841 F.2d 1485, 1491-1496 (10th Cir. 1988); Pet. App. 5a-7a. The Seventh Circuit has approached this problem by a different route, holding that the 1984 Act violates a defendant's Fifth Amendment procedural due process rights because it does not guarantee a post-indictment hearing at which the government has the burden of proof before restraining assets needed to pay attorneys fees. *United States v. Moya-Gomez*, 860 F.2d 706, 729-730 (7th Cir. 1988). *Accord, United States v. Monsanto*, 852 F.2d at 1411-1412 (Miner, J., concurring in part and dissenting in part); *id.* at 1418-1420 (Cardamone, J., concurring in part and dissenting in part).

in the lower courts has acknowledged that a restraining order may be modified to permit payment of customary living expenses out of potentially-forfeitable assets, provided the defendant can show that he has no other funds at his disposal. See Brief for the United States at 19-24, *United States v. Fischer*, 833 F.2d 647 (7th Cir. 1987).

b. Certain of the dissenters in *Monsanto*, while conceding that a post-indictment restraining order "brings a trial court's traditional equity powers into play," contended that a distinction should be drawn, in terms of hardship to the defendant, between the costs of a defense and other necessities of life. 852 F.2d at 1414 (Mahoney, J., dissenting). As Judge Mahoney put it:

> It is one thing to conclude that a district court might, in a given case, allow the invasion of re-

> strained assets to pay a grocer's bill, or provide emergency surgery. It is quite another to conclude that the statute authorizes the rather massive financial outlays often necessary to pay private defense counsel in RICO and CCE prosecutions.

This attempted dichotomy between legal fees and other living expenses finds no support in the language or legislative history of the statute. First, as Judge Winter observed, the statute's plain language refutes the suggested distinction, since "there is nothing in the [1984 Act] that exempts attorney's fees from the exercise of [the court's] traditional equity powers." *Monsanto*, 852 F.2d at 1409. Indeed, since the right to counsel of choice has constitutional dimension, Congress can hardly be thought to have singled out attorneys fees for *worse* treatment than other living expenses would receive. Congress was well aware that RICO and CCE cases are usually complicated and thus expensive to try.[10] Yet Congress explicitly stated, referring to the restraining-order provision, that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt. 1, 98th Cong., 2d Sess. 19 n.1 (1984).

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[10] *See, e.g., Forfeiture in Drug Cases: Hearings before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 52-55, 59 (1981) (*"House Hearings"*) (statement of ABA representative Stephen Horn). The legislative history is replete with references to the so-called "Black Tuna" case, in which several million dollars' worth of assets were subject to forfeiture, yet because of dissipation by the defendant, and because of a court order setting aside over $500,000 for the payment of attorneys fees, the government ultimately obtained forfeiture of only $16,000. *See, e.g.*, H.R. Rep. 98-845 Pt. 1, 98th Cong., 2d. Sess. 3 (1984); *House Hearings*, *supra*, at 53. But there is no suggestion in these passages that Congress disapproved of the payment of a defendant's legitimate attorneys fees. To the contrary, "[t]he only policy concern expressed [by Congress was] that 'a considerable amount of the "proceeds" of this drug operation are elsewhere, probably funding future "Black Tunas." ' " *Monsanto*, 852 F.2d at 1408 n.2 (Winter, J., concurring) (quoting H.R. Rep. 98-845 Pt. 1, *supra*, at 3). That statement, obviously, could not apply to *legitimate* attorneys fees.

Second, there is no reason for a court of equity to discriminate, on grounds of cost, against the necessity of a criminal defense. "So far as cost is concerned," Judge Winter observed, "a surgeon of one's choice may be as expensive as a lawyer of one's choice." *Monsanto*, 852 F.2d at 1408-1409. A court of course must ensure, as it would do in any other context, that the attorney's proposed fee is *bona fide* and reasonable in amount. But there is no basis for contending that the legitimate costs of a criminal defense are any less "ordinary and necessary" than the expense of a defendant's room, board, and medical care.

Finally, there is no reason for a court of equity to discriminate against the cost of legal representation on grounds of hardship. A defendant rendered indigent by a post-indictment restraining order may qualify for a court-appointed lawyer under the Criminal Justice Act. But he may also be able to satisfy his need for food by qualifying under the Food Stamp Act, his need for surgery by qualifying under the Medicaid Act, and his need for shelter by qualifying for publicly-assisted housing. It cannot seriously be contended that the existence of these other welfare programs eliminates the hardship of forced indigency. There is no greater basis to contend that the availability of court-appointed counsel eliminates the hardship of being prevented, by the unproven allegations of an indictment, from exercising one's Sixth Amendment right to hire the counsel of one's choice.

2. The government will suffer no legally cognizable hardship if a defendant is permitted to pay ordinary living expenses prior to an adjudication of guilt

In seeking a post-indictment restraining order, the government's objective is to ensure that the defendant does not dissipate potentially forfeitable assets. This governmental interest will normally be satisfied by issuance of a restraining order covering the bulk of the defendant's property. The narrow question here is whether the government suffers any meaningful hardship if the restraining order, instead of covering *all* the defendant's assets, exempts whatever funds are needed to pay normal living

expenses and legal fees during the relatively short period between indictment and conclusion of trial.

It is of course true that the government, upon conviction, will recover marginally fewer dollars if the defendant has been allowed to use potentially-forfeitable assets to pay for legal services and other necessities pending trial.[11] But there is nothing in the 1984 Act or its legislative history that identifies "revenue raising," without more, as an objective of criminal forfeiture. Indeed, the government expressly disclaimed such an interest in *Monsanto*. *See* 852 F.2d at 1407 (Winter, J., concurring). Thus, as Judge Winter properly concluded in that case, "[t]he mere fact that the assets ultimately forfeited after conviction may be less than if a total preconviction restraint had been imposed does not * * * contravene any purpose of the Act" (*ibid.*).

In assessing hardship on the government, rather, the inquiry must focus on the government's ability to achieve the objectives explicitly posited by Congress in enacting the 1984 forfeiture amendments. The legislative history identifies two major goals: to destroy the "economic power base" of organized crime and to "preserve the availability of a defendant's assets for criminal forfeiture." S. Rep. 98-225, *supra*, at 191, 196. Neither of these objectives is compromised by allowing a defendant to defray ordinary and necessary living expenses pending trial.

a. Congress's first objective in the CCE and RICO forfeiture provisions was to remove the economic benefit of crime by imposing a criminal forfeiture penalty on convicted persons. The significance of this deterrence interest, however, is severely constrained in the pre-conviction context by the due process prohibition on the imposition of punishment prior to conviction. *See United States v. Sal-*

[11] With respect to legal services, the marginal cost to the government will be the difference between the reasonable fees of retained counsel and the cost of appointed counsel, since both the government and the Fourth Circuit agree that a defendant constructively rendered indigent by a restraining order is entitled to representation under the Criminal Justice Act. *See* Pet. App. 9a.

erno, 107 S. Ct. 2095, 2101 (1987); *Bell v. Wolfish*, 441 U.S. 520, 535-537 (1979). At the time a restraining order is issued, the government's claim to allegedly illicit assets is conditional, since its ownership therein cannot vest until the outcome of the criminal trial.[12] As Judge Winter wrote in *Monsanto*: "There is nothing in the language or the legislative history of the Act indicating that Congress hoped to eradicate criminal organizations * * * by imposing financial penalties upon defendants *before* conviction and forfeiture" (852 F.2d at 1407 (emphasis original)).

The significance of Congress's general penal objective is even further diminished when the funds in question, if not forfeited to the government, will be paid to third parties in exchange for the necessities of life and the costs of defense. Those funds will then be removed in any event from the convicted defendant's "economic power base" (S. Rep. 98-225, *supra*, at 191), and the general penal goal of forfeiture will be achieved. The defendant, of course, may prove a more effective adversary if he is allowed to pay his grocer, his doctor, and his lawyer prior to the conclusion of trial. But that is not a "hardship" of which the government may legitimately complain.[13]

[12] Notwithstanding the "relation back" provision of the statute, the government will not obtain title to the allegedly forfeitable property unless and until the defendant is actually convicted. *See* 21 U.S.C. (Supp. IV 1986) § 853(a) & (c).

[13] Contrary to the suggestion of the court below (Pet. App. 21a), Congress did not intend to punish defendants prior to conviction by depriving them of the ability to hire especially qualified lawyers. As noted in the text, this Court has squarely held that the Fifth Amendment prohibits the imposition of punishment before conviction. *Bell v. Wolfish*, 441 U.S. at 535-537. Nor does the ability to retain counsel of one's choice—or to pay for food and shelter prior to trial—constitute an aspect of "undeserved economic power" (Pet. App. 21a). As the Fifth Circuit stated in *Thier*:

> Expenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel to prove his innocence or protect his procedural rights should not be considered incentives to crime. The notion that a defendant would commit criminal acts to accumulate monies

b. Congress's second objective in the 1984 Act was to preserve assets for potential forfeiture by preventing defendants from depleting their estates. But as Judge Winter explained in *Monsanto*, "[t]he 'depletions' with which Congress was concerned were * * * only those that enable a defendant to avoid the economic impact of a *post-conviction* forfeiture" (852 F.2d at 1407 (emphasis original)). Expenditures made to defray ordinary and necessary living expenses "do not enable a defendant to avoid the economic impact of a post-conviction forfeiture, because such expenditures would have been made without regard to the prospect of such a forfeiture" (*id.* at 1407-1408 (Winter, J., concurring)).

Congress explained that the 1984 Act was designed "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions." S. Rep. 98-225, *supra*, at 200-201. Congress repeatedly voiced concern about "defendants defeating forfeiture by removing, transferring, or concealing their assets" (*id.* at 195) and "shield[ing] them from * * * forfeiture" (*ibid.*). Congress stated that the relation-back provision was aimed at "improper pre-conviction transfers" (*id.* at 196, 197) and at "improper disposition of forfeitable assets" (*id.* at 194). And Congress explained that the exception for good-faith transferees "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (*id.* at 209 n.47).[14]

> or property in order to pay for necessary food, clothing and shelter while he is being tried or in order to pay a reasonable attorney fee to the attorney he chooses to assist in his defense is sophistry.

801 F.2d at 1474-1475. Or, as Judge Logan put it somewhat more colorfully, dissenting in *United States v. Nichols*, 841 F.2d 1485, 1512 (10th Cir. 1988): "[E]quating the ability to raise a defense to a 'benefit' of crime is like considering the right to a jury trial a benefit of being accused of murder."

[14] The goal of preventing improper pre-conviction transfers pervades

Read as a whole, the Act's legislative history shows that Congress wanted to prevent defendants from *evading* or *defeating* forfeiture by disposing of assets that would normally have been available for forfeiture at the time of conviction. This goal is obviously served by preventing a defendant from making unlawful expenditures, concealing his assets, or engaging in fraudulent conveyances. It is likewise served by preventing lavish and extravagant expenditures designed to accelerate consumption into the pretrial period, and by preventing gratuitous transfers to friends or relatives for purposes of concealment and later use. As Judge Winter concluded, however, "[p]reventing ordinary lawful expenditures * * * does not serve *any* purpose of the Act," since such expenditures do not deplete the defendant's estate of any property that, in the normal course of events, would have been in his possession at the conclusion of trial. *Monsanto*, 852 F.2d at 1408 (emphasis added).[15]

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the legislative history of the 1984 Act. As early as 1980, Senator Biden identified as a principal difficulty with current law "the dissipation of assets once the * * * parties being investigated had become aware that they are under investigation." *Forfeiture of Narcotics Proceeds: Hearings before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. 104 (1980). When introducing proposed legislation in March 1982, the Justice Department stated that existing law did not "provide adequate mechanisms for dealing with the problem of defendants defeating forfeiture by transferring, removing, and concealing their forfeitable property so that it may no longer be reached by the Government at the time of conviction." *House Hearings*, *supra*, at 156 (testimony of Deputy Associate Attorney General Jeffrey Harris). The Justice Department stated that its proposed relation-back provision "should discourage the practice of defendants engineering sham transfers of their property to associates and relatives in an attempt to defeat forfeiture" (*id.* at 167). Because Congress's principal concern was to prevent defendants from fraudulently defeating forfeiture, many lower courts, including the district court below, reasonably concluded that Congress did not intend the 1984 Act even to *apply* to legitimate attorneys fees. *See* Pet. App. 88a; *United States v. Estevez*, 645 F. Supp. 869 (E.D. Wis. 1986); *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986); *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

[15] Although Congress did not explicitly address the question of a

In sum, Congress's objective of "preserving assets for forfeiture" simply does not extend to assets that would have been consumed prior to the conclusion of trial in the ordinary course of events. Thus, the only detriment that the government suffers when a restraining order exempts assets needed to pay legal fees and other living expenses is a fiscal one. This fiscal detriment is equal to the difference between the cost to the government of having the defendant fed, sheltered, represented and doctored at public expense, and the amount that the defendant must pay to secure these necessities privately. But because the government concedes that revenue raising, without more, was not among Congress's objectives in the 1984 Act, this modest fiscal detriment is not a cognizable "hardship" for purposes of the restraining-order calculus.

C. Assets That Have Or Should Have Been Exempted Under A Properly-Entered Restraining Order Must Be Immunized From Forfeiture Upon Conviction

We have shown above that a district court, upon properly balancing the hardships to the government and the defendant, must exempt from a post-indictment restraining order whatever funds are needed to defray the defendant's ordinary living expenditures, including reasonable attorneys fees, prior to the conclusion of trial. It necessarily follows that any funds paid, consistently with the restraining or-

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defendant's subsistence expenses pending trial, Congress did discuss another form of innocuous diminution in the value of a defendant's forfeitable estate. Noting that "a defendant may succeed in avoiding the forfeiture sanction simply by transferring his assets to another • • • or taking other actions to render his forfeitable property unavailable at the time of conviction" (S. Rep. 98-225, *supra*, at 201), Congress in 1984 proposed adding a "substitute assets" provision to the CCE statute. This provision, ultimately enacted in 1986, permits forfeiture of substitute assets if property subject to forfeiture, "as a result of any act or omission of the defendant, • • • has been substantially diminished in value." 21 U.S.C. (Supp. IV 1986) § 853(p)(4). Congress explained in 1984 that this provision "will be of utility where a defendant substantially depletes a forfeitable asset in anticipation of its being forfeited. It is phrased, however, so that it will not apply where the value of the property *has been subject to minimal or ordinary depreciation.*" S. Rep. 98-225, *supra*, at 202 n.32 (emphasis added).

der, to third-party providers of goods and services must be immune from forfeiture if the defendant is ultimately convicted. This conclusion is dictated by the statutory language, by basic principles of equity, and by common sense.

1. Section 853(c) of the CCE statute, 21 U.S.C. (Supp. IV 1986) § 853(c), entitled "Third party transfers," provides as follows (emphasis added):

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant *may be the subject of a special verdict of forfeiture* and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture.

This "relation-back" provision, like the restraining-order provisions, was designed to ensure that defendants do not evade forfeiture by improperly alienating their assets before trial. Congress's expressed objective in Section 853(c) was to "set[] out clear authority for voiding *improper preconviction transfers* of assets subject to criminal forfeiture." S. Rep. 98-225, *supra*, at 197 (emphasis added). As to what constitutes an "improper transfer," the legislative history refers to "transfers that were not 'arm's length' " (*id.* at 201); "sham or fraudulent transactions" (*id.* at 209 n.47); and transfers "to third parties acting as nominees of the defendant" (*ibid.*). On the other hand, Congress stated that "this provision should not operate to the detriment of innocent *bona fide* purchasers of the defendant's property" (*id.* at 201).

2. The language and legislative history of Section 853(c) show that it vests the district court with equitable discre-

tion in imposing a forfeiture. Just as Section 853(e)(1) states that the court "may enter a restraining order," so Section 853(c) states that property transferred to third parties "may be the subject of a special verdict of forfeiture." As Judge Winter concluded in *Monsanto*, these two sections must logically "be interpreted *in pari materia*" (852 F.2d at 1410). In other words, once a court has exercised its discretion to issue a restraining order that permits payment of the defendant's necessary living expenses, the court must similarly exercise its discretion to immunize the payees from forfeiture of the funds that they have in good faith received.[16]

Any other construction of the relation-back provision, as Judge Winter pointed out, "would essentially nullify the district court's equitable authority to permit defendants to make ordinary lawful expenditures under Section 853(e)(1)." *Monsanto*, 852 F.2d at 1410. If payments made to third parties consistent with the restraining order were subsequently forfeited, it would make a mockery of the court's processes. The court's order would be a nullity unless the doctors, lawyers, and grocers who furnished the defendant's necessities were assured that they could keep the money they were paid. Lacking such assurance, they would refuse to deal with the defendant at all. Thus, if the court's power to authorize payment of necessary living expenses is to have any effect, payments made to third-party providers of necessities must be immunized from forfeiture under Section 853(c). *Accord*, *United States v. Monsanto*, 852 F.2d at 1418 (Mahoney, J., dissenting); *id.* at 1419 (Pierce, J., concurring in part and dissenting in part).

[16] This construction of Section 853(c) does not circumvent the requirement appearing in the same subsection that property which is the subject of a special verdict of forfeiture "thereafter shall be ordered forfeited to the United States." 21 U.S.C. (Supp. IV) § 853(c). This latter clause simply mandates the forfeiture of assets as to which the court has rendered a special verdict of forfeiture. For the reasons discussed in the text, however, such a special verdict of forfeiture would not include property transferred as payment to third parties pursuant to exceptions in the court's restraining order.

This same conclusion is dictated by principles of equity, since a contrary result would punish, not the convicted defendant, but the third-party providers who acted in good faith and in reliance on the district court's authority. A private defense counsel, for example, who continued to represent the defendant based on a post-indictment restraining order allowing fees to be paid from allegedly forfeitable assets, would be irrationally penalized if the government were later permitted to forfeit his fee. It is no answer that the defense attorney, like other third-party transferees, has a right under Section 853(n)(6)(B) to assert an interest in the property at a post-conviction hearing. Although the lawyer would be a *bona fide* purchaser for value, he could not demonstrate that he was "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). Indeed, "[n]o one is more on notice of likelihood that [illicit] money may come from * * * prohibited activity than the lawyer who is asked to represent the defendant [at] trial." *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

The government has a powerful interest in punishing convicted drug traffickers and stripping them of their economic power. But the government has no legitimate interest in punishing those persons who, in reliance on a district court order, provide goods and services to the defendant for fair value and in good faith. Accordingly, once a court decides under Section 853(e)(1) to permit the defendant to make ordinary and necessary living expenditures under the court's supervision and control, the funds so paid must be exempt from subsequent forfeiture in the hands of the third parties.

3. In the instant case, the district court issued at the government's request an *ex parte* restraining order covering virtually all Reckmeyer's assets. That order made no exceptions for payment of attorneys fees or for living expenses of any kind. Applying to the instant case the principles just discussed, it is clear that the fees that would have been paid to Caplin & Drysdale but for the overbroad

restraining order must be exempted from forfeiture under Section 853(c).

If the district court had exercised its equitable discretion at the *ex parte* hearing, as required by the statute, it plainly would have made some provision for the payment of Reckmeyer's legitimate attorney's fees and other necessities of life. Indeed, but for the fact that Reckmeyer pled guilty the day before his motion to modify the restraining order was scheduled to be heard, the district court would undoubtedly have granted that motion and permitted the payment of fees. This is evident from the court's subsequent ruling on Caplin & Drysdale's Section 853(n) claim. In granting the firm's request to modify the forfeiture order, the court concluded that "there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorneys' fees" (Pet. App. 89a). The district court also found that, if attorneys fees were not exempted from forfeiture, counsel of choice would withdraw from the case, thus causing substantial harm to the defendant (*ibid.*).[17]

Based on the district court's findings concerning hardship and the government's interest in forfeiture, there can be little doubt that the court, had it exercised its equitable discretion from the outset, would have struck the balance in favor of excepting from the restraining order those assets needed by Reckmeyer to pay ordinary lawful expenditures, including Caplin & Drysdale's legal fees. Moreover, if for some reason the district court would not have exempted sufficient assets to pay those fees, it would have erred in failing to do so for the reasons set out in the discussion of Section 853(e)(1)(A) above. In either event, the government cannot now be permitted, in reliance on

[17] Caplin & Drysdale's willingness to continue its representation of Reckmeyer in this case was based, in large part, on its belief that the statute should not be read to bar payment of fees, or, in the alternative, that the statute was unconstitutional (Pet. App. 76a n.11). If this Court affirms the Fourth Circuit, defense counsel in the future would almost certainly decline such a representation.

an overbroad *ex parte* order, to demand forfeiture of assets that would have been immune from forfeiture if paid to Caplin & Drysdale under an order that was validly entered.

II. IF THE STATUTE IS CONSTRUED SO AS TO PREVENT A DEFENDANT FROM PAYING LEGAL FEES AND OTHER NECESSARY LIVING EXPENSES PRIOR TO THE CONCLUSION OF TRIAL, IT IS UNCONSTITUTIONAL UNDER THE FIFTH AND SIXTH AMENDMENTS

This Court has often invoked the principle that, when a statute is fairly susceptible of more than one interpretation, the interpretation most consistent with constitutionality should be adopted.[18] We believe that our construction of the 1984 forfeiture amendments, outlined above, is most consistent with the statutory language, with the legislative history, and with general principles of equity. At the very least, it is a fair and reasonable construction of the statute that should be adopted so as to avoid the serious difficulties that would otherwise arise. Even the Fourth Circuit acknowledged that its holding created "many complex problems concerning access to defense counsel, the attorney-client privilege, and the re-

[18] *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1397 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"); *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974) ("it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided" (citation omitted)); *United States v. Rumely*, 345 U.S. 41, 45 (1953) (choice between "fair alternatives" must favor that which avoids serious constitutional questions). Indeed, this Court upon occasion has construed statutes in ways contrary to their most literal reading in order to avoid unjust, oppressive or absurd results. *See United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-487 (1868). *See also Chatwin v. United States*, 326 U.S. 455, 464 (1946); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

source needs of public defenders" (Pet App. 19a.) "[I]f anything remains of the canon that statutes capable of differing interpretations should be construed to avoid constitutional issues," Judge Winter wrote in *Monsanto*, "it surely applies here." 852 F.2d at 1409 (citing *Kent v. Dulles*, 357 U.S. 116 (1958)).

A. The Sixth Amendment Bars The Governmental Use Of Criminal Forfeiture To Deprive A Defendant Of His Ability To Retain Counsel To Defend Against The Charges On Which The Proposed Forfeiture Is Based

An interpretation of the 1984 Act that would empower a district court, upon *ex parte* application by the government, to restrain all of a defendant's assets would permit the government to render most CCE and RICO defendants unable to retain private counsel to defend themselves. Similarly, the threat of forfeiture of legal fees under Section 853(c), even in the absence of a pre-conviction restraining order, will cause most private counsel to decline to represent a defendant charged with a broad forfeiture count. Because there is no countervailing governmental interest capable of justifying this extreme restriction on a defendant's right to retain counsel of his choice, the 1984 Act as so interpreted would be unconstitutional under the Sixth Amendment.

1. *The Fourth Circuit's construction of the statute would make it impossible for a defendant charged with a broad forfeiture count to retain private counsel*

The Fourth Circuit *en banc* recognized only one exception to the government's absolute right to forfeit a convicted defendant's property—the third-party exemptions set forth in Section 853(n). *See* Pet. App. 22a. Under Section 853(n)(6)(B), however, a third-party transferee cannot defeat the government's claim unless he proves that he was "reasonably without cause to believe that the property was subject to forfeiture." By virtue of the services that an attorney performs and the information to which he necessarily has access, a competent defense lawyer would rarely if ever be able to make such a showing.

The Fourth Circuit's reading of the statute thus gives the government virtually absolute power, in a wide variety of cases,[19] to ensure that no private counsel will take the defendant's case. By securing a broad, *ex parte* restraining order, the government can prevent the payment of counsel fees outright. And even without a restraining order, the government can put prospective counsel "on notice," through forfeiture counts in the indictment, that legal fees previously or subsequently paid are at risk. Indeed, in most drug and white collar criminal cases, the prosecutor could prevent a defendant from ever retaining private defense counsel, or could bring about the immediate termination of an existing representation, simply by adding a RICO or CCE charge that includes a broad list of assets subject to forfeiture.[20]

Besides the risk of non-payment, ethical problems caused by the Fourth Circuit's holding will cause competent defense counsel to decline CCE and RICO representations. As construed by the *en banc* court, the CCE statute pro-

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[19] Although most current criminal forfeiture litigation concerns defendants charged with drug-related crimes under the CCE statute, the principles established in these cases extend through the RICO statute to a variety of white collar criminal prosecutions.

[20] Assets subject to forfeiture under CCE are not limited to the proceeds of drug sales but also include any property used in whole or in part in the commission of drug offenses and any property or rights "affording a source of control over, the continuing criminal enterprise." 21 U.S.C. (Supp. IV 1986) § 853(a). The RICO forfeiture provisions, 18 U.S.C. (Supp. IV 1986) § 1963(a), can produce even more draconian results because they render an entire enterprise subject to forfeiture if the government charges that it was used in a relatively isolated pattern of racketeering activity. For example, in a recent RICO prosecution in the Eastern District of Virginia, defendants convicted of selling $105 worth of pornographic material in violation of RICO forfeited their entire interest in their legitimate video cassette rental business valued at over $1 million. *United States v. Pryba*, No. 87-00208-A (E.D. Va. 1988). Under the Fourth Circuit's reading of the statute, prospective defense counsel would have to be concerned not only with whether assets used to pay his fees are criminally derived, but also with whether otherwise legitimate assets have become tainted by their connection, however remote, to criminal activity.

duces a direct personal conflict between an attorney's interest in his fee and his client's best defense. The lawyer undertaking such a case would have a disincentive to learn facts about his client's conduct that might be relevant to the defense, but that might inhibit him from demonstrating in post-conviction proceedings that he was at the relevant time "reasonably without cause to believe" that the fee was subject to forfeiture. As the district court below explained (Pet. App. 91a-92a), the conflict between a lawyer's desire to retain his fee and his obligation faithfully to represent his client could also result in a reluctance to pursue certain defense strategies, or in recommendations in the plea-bargaining context colored by counsel's judgment of which action is most likely to permit payment of his fee.[21]

The significance of these conflicts of interest is not blunted by the Fourth Circuit's facile assurances (Pet. App. 18a-19a) that defense counsel will invariably rise above them. A lawyer is ethically prohibited from entering into an attorney-client relationship, especially in a criminal case, where he has a personal financial interest that may conflict with the interests of his client; it is irrelevant whether he in fact abuses the conflict. *See* ABA Model Rules of Professional Conduct ("Model Rules") 1.7(b), 1.8(j); ABA Model Code of Professional Responsibility ("Model Code") DR 5-103(A), 5-105(A).[22] The conflicts created by forfeiture of

[21] For example, an attorney might be motivated to negotiate a plea whereby the defendant would trade gravity of offense or length of sentence for exemption of assets sufficient to pay legal fees. Alternatively, in a close case, the attorney might recommend that the defendant stand trial rather than plead guilty if the government is unwilling to negotiate a plea that would permit fees to be paid. Even at trial, a defendant's interest might best be served by asserting his privilege against self-incrimination, whereas his counsel might be motivated to recommend that he take the stand and explain his financial history in an effort to preserve from forfeiture sufficient assets to pay legal fees.

[22] This Court has specifically held that adherence to "ethical standards of the legal profession" is an "independent interest" of the federal courts because of the "institutional interest in just verdicts." *Wheat v. United States*, 108 S.Ct. 1692, 1697-1698 (1988).

attorneys fees closely resemble those created by contingent fees, which are ethically prohibited in criminal cases. Model Rule 1.5(d)(2); Model Code DR 2-106(C). Such conflicts could easily rise to the constitutional level of ineffective assistance of counsel, spawning additional litigation affecting the validity of criminal convictions and pleas.[23]

In sum, the Fourth Circuit's holding would make it virtually impossible, both for financial and ethical reasons, for CCE and RICO defendants to secure private counsel. While the defendant may qualify for appointed counsel under the Criminal Justice Act, such assistance will rarely be the equal of what he would have obtained on his own. Appointed counsel will almost certainly have less experience in complex CCE and RICO cases, as well as fewer resources with which to investigate and defend the offenses charged. And private attorneys who have handled the case prior to indictment will frequently withdraw, depriving the defendant of their expertise and requiring newly appointed counsel to prepare hurriedly and inadequately for trial.

2. *Such an extreme restriction on a defendant's right to counsel of choice, in the absence of any substantial countervailing governmental interest, would violate the Sixth Amendment*

a. In *Wheat v. United States*, 108 S.Ct. 1692, 1697 (1988), this Court squarely held that a defendant has a "Sixth Amendment right to choose [his] own counsel." *Accord, e.g., Powell v. Alabama*, 287 U.S. 45, 53 (1932). The Court explained in *Wheat* that this constitutional right is "circumscribed" or "qualified" in various respects (108 S.Ct. at 1697). Some of these qualifications flow from the constraints of the defendant's personal situation, such as

[23] This Court has held that actual conflicts of interest violate the Sixth Amendment guarantee of effective asistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60, 76 (1942).

his ability or inability to afford a particular lawyer. Other qualifications are sought to be imposed by the government.

Up to now, this Court has considered a variety of governmentally-imposed qualifications on the right to counsel of choice. Most of these have reflected administration-of-justice concerns, such as a prosecutor's desire to disqualify defense counsel for conflicts of interest (*e.g.*, *Wheat v. United States*, *supra*) or a court's denial of a continuance to an allegedly unprepared defense lawyer (*e.g.*, *Morris v. Slappy*, 461 U.S. 1 (1983); *Ungar v. Sarafite*, 376 U.S. 575, 588-591 (1964)). The lower courts have addressed restrictions of a similar nature, such as requirements that chosen defense counsel be a lawyer (*e.g.*, *United States v. Schmitt*, 784 F.2d 880 (8th Cir. 1986)) or a member of the bar of the state in which the court sits (*e.g.*, *Bedrosian v. Mintz*, 518 F.2d 396 (2d Cir. 1975)).

When this Court has upheld the denial of a defendant's counsel of choice, it has done so by weighing the competing interests and concluding that the judicial system's interest in the fair and efficient administration of justice outweighed the defendant's interest in retaining a particular lawyer. *See e.g.*, *Wheat v. United States*, *supra*, 108 S.Ct. at 1698 (reasoning that a conflict of interest on the part of chosen counsel can deprive the defendant of his right to effective assistance and preclude a fair trial). The defendant's interest in each of these cases was quite limited: the desire to hire one particular lawyer from among the universe of available counsel. The Court has not previously considered a situation, such as this one, in which the government seeks to deprive a defendant of the ability to retain private counsel of any kind.

b. In this case, the initial Fourth Circuit panel opinion balanced the competing interests of the government and the defendant and concluded that the CCE forfeiture provisions are unconstitutional to the extent they prevent the payment of legitimate attorneys fees (Pet. App. 70a). The panel reasoned (*id.* at 60a-63a) that the right to counsel of choice, albeit qualified, is the core of the Sixth Amend-

ment right to counsel, predating the more recently articulated right to appointed counsel (*Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)) and the right to effective assistance of counsel (*McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The panel distinguished cases that have permitted the denial of a defendant's request for a *particular* lawyer, pointing out that the government's interpretation of the forfeiture provisions would deny a defendant the opportunity to hire *any* counsel at all (Pet. App. 68a-69a).

Balancing the government's asserted interests in forfeiting assets intended or used to pay legal fees against this total denial of a defendant's right to counsel of choice, the panel reasoned that the government's interests are paramount only to the extent they track the specific purpose of the "relation-back" provision—to prevent sham transfers in the guise of attorneys fees (*id.* at 67a-69a). If a defendant is permitted to pay *legitimate* attorneys fees, the panel reasoned, the government's interest in depriving a criminal of the economic benefits of his crime upon conviction can be squared with the defendant's right to hire counsel of choice to defend him (*id.* at 67a). *Accord*, *United States v. Monsanto*, 852 F.2d at 1402-1404 (Feinberg, C.J., concurring).

The panel's analysis is plainly correct. As we have already shown (*see* pages 23-28, *supra*), the government has no cognizable interest, at least none derived from the 1984 Act, in disabling a defendant from paying *bona fide* attorneys fees and other necessary living expenses prior to the conclusion of trial. On the other side of the balance, the interference with a defendant's ability to hire counsel of choice is complete—no defendant subject to a forfeiture claim covering all his known assets, such as the claim asserted in the indictment in this case, will be able to pay or assure payment to a lawyer and, consequently, he will be unable to retain any private counsel.[24] This total denial

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[24] As the panel recognized, the defendant in this case, Christopher Reckmeyer, would not have been represented by retained counsel if the law were not unsettled at the time of his indictment and Caplin

of any opportunity to hire counsel has a direct impact on the reliability of the adversary process because it will frequently eliminate the lawyers who have represented the defendant prior to indictment and who are most familiar with his case.

c. The court of appeals in its *en banc* opinion failed to balance the government's interests against the defendant's Sixth Amendment rights. Instead, it adopted the erroneous view that a defendant facing forfeiture charges *has no assets* with which to hire a lawyer, and thus occupies the same position as a pauper who has no alternative to court-appointed counsel (Pet. App. 13a). The majority acknowledged that the statute "can render a defendant unable to secure private counsel through a restraining order or the threat of future forfeiture" (*id.* at 9a). But relying on the relation-back provision and the fact that "the government contests the legal ownership of the assets," the court asserted that the right to counsel of choice "simply does not apply at all in the fee forfeiture context" (*id.* at 11a-12a).

By equating the fictive property-law concept of the relation-back provision with such "[p]urely private predicaments" as creditors' liens or lack of wealth (Pet. App. 13a), the *en banc* majority begged the constitutional question rather than answering it. What the Fourth Circuit majority assiduously ignored is that the forfeiture provisions are explicitly *penal* in nature and attach only upon the defendant's conviction of the underlying crime. 21 U.S.C. (Supp. IV 1986) § 853(a). Absent conviction, the property sought to be forfeited does not vest in the government, regardless of how illegitimately the defendant may have employed his wealth.[25] Thus, the relation-back provision is properly viewed as a mechanism for prevent-

& Drysdale had not agreed to contest the applicability of the CCE statute to attorneys fees (Pet. App. 76a-77a n.11).

[25] Assets potentially subject to forfeiture thus differ from the proceeds of a bank robbery, since the bank's claim, unlike the government's, is not based on a penal statute but on its pre-existing property rights. Assets subject to forfeiture under Section 853(a) likewise differ from illegal drugs, since nobody can have legal title to contraband.

ing fraudulent conveyances of the defendant's assets, not as a device for determining true title to property.

The Fourth Circuit also completely ignored the government's role in rendering the defendant's assets unavailable to him. The defendant's "private predicament" here does not result from the laws of nature or economics. Rather, the unavailability of his assets comes about solely as a result of a prosecutor's allegation, under a federal penal statute, that the accused has no assets that are not subject to forfeiture, accompanied by the district court's issuance of a broad restraining order on the prosecutor's *ex parte* request. Indeed, the majority's assertion that "the fact that the government contests the legal ownership of the assets is crucial" (*id.* at 12a) concedes both the government's responsibility for the defendant's impecuniousness and the fact that the defendant's wrongdoing has yet to be proved. In short, it is only by attempting to cast the government in the role of Pontius Pilate, disclaiming any responsibility for the defendant's forced indigency, that the Fourth Circuit could avoid addressing the balancing of interests called into play by the "Sixth Amendment presumption in favor of counsel of choice". *Wheat v. United States*, *supra*, 108 S.Ct. at 1697.

We have previously shown that the sole detriment suffered by the government when allegedly-forfeitable assets are used to pay attorneys fees is a modest sum of money—the difference between the cost to the Treasury of providing the defendant with a lawyer (*i.e.*, the cost of a public defender or appointed counsel), and the reasonable fees of a private attorney. The Fourth Circuit *en banc* in effect holds that this marginal increment in the amount of money the government may retain upon conviction is constitutionally superior to a defendant's Sixth Amendment right to counsel of choice. But this Court has never suggested, in this or any other context, that the government's interest in maximizing a monetary penalty has precedence over a defendant's constitutional rights. As the Fourth Circuit panel concluded, and as the four *en banc* dissenters found, the government's rather modest financial

interest cannot reasonably be found to outweigh a defendant's right to retain *some* private counsel to defend him against the type of complex, far-ranging criminal charges at issue in CCE and RICO cases such as this.

d. The Fourth Circuit supported its refusal to recognize Reckmeyer's Sixth Amendment rights by positing that "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture" (Pet. App. 21a-22a). Quite the contrary: public confidence in the judicial system is far more likely to be impaired by the spectacle of defendants being purposefully rendered indigent by the government before trial, particularly where the possibility exists that forfeiture claims can be used selectively to remove unusually competent adversaries. As this Court observed in *Wheat*, a cardinal value of the Sixth Amendment is that "legal proceedings appear fair to all who observe them" (108 S.Ct. at 1697). A system that affords the government the discretion to restrict the resources available to its opponent to contest the very allegations at issue is unlikely to seem fair either to the citizenry or to the bar.[26]

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[26] This Court's reasons for upholding the denial of a defendant's counsel of choice in *Wheat*—the elimination of serious potential conflicts of interest on the part of defense counsel with their attendant deleterious effects on the fair administration of justice—cut exactly the opposite way in the instant case. As we have explained above (at pages 35-37), any attorney willing to represent a defendant faced with broad forfeiture counts will confront a "serious potential for conflict" (108 S.Ct. at 1700) between his obligation faithfully to represent his client and his desire to retain his fee. An ethical lawyer who has represented his client throughout the grand jury proceedings may be forced to resign (or be disqualified on the government's motion because of a potential conflict under *Wheat*), thereby substantially impairing the quality of the client's defense and "the institutional interest in the rendition of just verdicts in criminal cases" (108 S.Ct. at 1698). And whereas the counsel-of-choice issue in *Wheat* was limited to whether *a particular lawyer* could represent the defendant, the impact of fee forfeiture will be to eliminate, at the discretion of the prosecutor, the entire universe of ethical retained counsel. As the panel in this case noted (Pet. App. 63a), the effect of the government's including a broad forfeiture count in a CCE or RICO indictment is the same as if Congress had passed a law dictating which lawyers a defendant might retain, or placing a cap on the fee that his chosen lawyer might be paid.

B. The Fifth Amendment Prohibits Empowering The Government To Destroy The Balance Of Forces Between It And The Accused By Eliminating, At Its Discretion, An Indicted Defendant's Ability To Retain Private Counsel

This Court has recognized that the Due Process Clause of the Fifth Amendment requires a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). In a somewhat different context, the Court has stated that due process requires criminal procedures that do not offend a "sense of justice." *Rochin v. California*, 342 U.S. 165, 173 (1952). And this Court has held that a defendant's due process protection includes a "reasonable opportunity to employ and consult with counsel." *Chandler v. Fretag*, 348 U.S. 3, 10 (1954).

The district court in this case correctly concluded that "forfeiture of attorney's fees would undermine the adversary system * * * by producing an imbalance of powers that would violate the due process clause" (Pet. App. 91a). As the district court explained (*id.* at 90a-91a):

> [S]ubjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is "on notice." Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable.

The district court in *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985), properly reached the same conclusion, noting that forfeiture of attorneys fees would give the government "the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an in-

dictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries."

The Fourth Circuit, while acknowledging the possibility of prosecutorial abuse, held that any such misconduct must be determined on a case-by-case basis by evaluating the "specific facts" relating to a forfeiture allegation (Pet. App. 19a). The problem with that approach, as with any challenge to the exercise of prosecutorial discretion, is that it is virtually impossible for a court (at least one lacking clairvoyance) to ascertain what a prosecutor's purpose was in deciding whether, and to what extent, to include forfeiture allegations in an indictment. Furthermore, unlike the normal exercise of prosecutorial discretion involved in determining whether to charge a defendant with one or more crimes, the prosecutorial decision concerning forfeiture will, in many instances, allow the government to increase substantially the likelihood of obtaining a conviction by eliminating the experience, talent and investigative resources of private counsel.

In the court of appeals, the government denied any attempt to arrogate to itself the power to determine its adversaries in criminal proceedings (C.A. Br. 34-35). Instead, the government argued that a defendant rendered indigent by the prosecutor's unproven accusations has only himself to blame, since he voluntarily engaged in conduct that the government intends to prove wrongful (*ibid.*). But this argument erroneously assumes the defendant's guilt. Equally improperly, it ignores the dangers posed to our adversary system when the likelihood that retained counsel can undertake or continue a representation is increasingly diminished, the more serious and complicated the government's charges become.

The impact of a decision upholding the government's position in this case would be widespread, extending from drug cases like this one to a variety of white collar RICO prosecutions. The effect of the Fourth Circuit's decision would expand even further as Congress adds to the list

of forfeitable offenses. A bill now pending in Congress, for example, would make simple mail and wire fraud forfeitable offenses, and other legislative initiatives would make the proceeds of tax crimes forfeitable under the money-laundering statutes.[27] The Fourth Circuit's decision, unless reversed, will thus cause many of the most complex white collar criminal prosecutions to devolve upon already overburdened and underfunded court-appointed attorneys and public defenders, since private counsel will refuse to take the risk that their legitimately earned fees either will be unpaid or will be subsequently forfeited to the government.

The Fourth Circuit's decision would also work a fundamental change in the historic relationship between a defendant, his counsel, and the prosecutor. For almost 200 years prior to the 1984 forfeiture amendments, a defense lawyer could play his role in the adversary system without fear that he would himself be the target of government action except for conduct manifestly illegal, such as witness tampering, jury tampering, subornation of perjury, or the like. Now, the mere receipt of payment for services rendered in good faith may be prevented or attacked by the government. The prosecutor's considerable discretion in determining the scope of the indictment and the property subject to forfeiture in effect places the defendant and his counsel at the mercy of his adversary. One does not have to posit malicious abuses of government power to recognize the significant shift in the balance of forces between prosecution and defense wrought by the Fourth Circuit's decision. The creation of such an imbalance of powers undermines the adversary system and is in itself a violation of the Due Process Clause.

CONCLUSION

The decision of the Fourth Circuit *en banc* should be reversed, and the case should be remanded with instruc-

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[27] *See* H.R. 2898, 100th Cong., 1st Sess. (1987); Draft Bill, Minor and Technical Criminal Law Amendments Act of 1988, § 149, Senate Committee on the Judiciary, 100th Cong., 2d Sess. (1988).

tions to reinstate the judgment of the district court in favor of petitioner.

Respectfully submitted,

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